

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDY ZACHERLE,

Defendant.

No. CR-06-0100-FVS

ORDER RE: PRETRIAL MOTIONS

THIS MATTER came before the Court for a pretrial conference on November 12, 2008. Assistant United States Attorney Stephanie J. Lister appeared on behalf of the United States. Defendant was present and represented by Jeffrey Scott Niesen. This order is intended to memorialize and supplement the Court's oral ruling.

Defendant filed multiple pretrial motions which were addressed by the Court at the pretrial conference. Defendant requested the following relief:

1. An order suppressing all evidence seized from the residence located on Highway 97 in Okanogan, Washington on February 17, 2006. (Ct. Rec. 176; 38).
2. An order consolidating the counts listed in the superseding indictment. (Ct. Rec. 178).
3. An order dismissing the superseding indictment due to "triple Jeopardy." (Ct. Rec. 180; 82).
4. An order granting Defendant's motion in limine to limit testimony, evidence and other matters at Defendant's trial. (Ct. Rec. 182; 97).

- 1 5. An order granting Defendant's request to explain to the
2 jury differences between tribal court and federal court
3 proceedings. (Ct. Rec. 184; 94).
- 4 6. An order granting Defendant's request for the jury to
5 view Defendant's leg and knee scars. (Ct. Rec. 186; 98).
- 6 7. An order granting Defendant's request for additional
7 discovery. (Ct. Rec. 188).
- 8 8. An order granting Defendant's request to admit verbatim
9 transcripts of prior state and tribal trials. (Ct. Rec.
10 190; 96).
- 11 9. An order granting Defendant's motion in limine with
12 respect to the videotape, a shocking device and Defendant's
13 criminal record. (Ct. Rec. 192).
- 14 10. An order granting Defendant's motion in limine with
15 respect to the government's handwriting expert, Peter J.
16 Belcastro, Jr. (Ct. Rec. 195).
- 17 11. An order granting Defendant's motion in limine to prohibit
18 the government from showing the jury any images of child
19 pornography. (Ct. Rec. 198).

20 The government also filed a pretrial motion. The government
21 requested that Defendant provide a written summary of its expert
22 witness, Marcus Lawson (computer and forensic evidence expert). (Ct.
23 Rec. 209).

24 **BACKGROUND**

25 **A. The Warrant**

26 On January 27, 2006, at approximately 12:45 a.m., Deputy Hawley
of the Okanogan County Sheriff's office observed a 1989 Blue Buick
regal registered to Tami and Randy Zacherle parked on Sandflat Road.
Deputy Hawley observed a computer tower and a Gateway computer book
inside the vehicle. He contacted Tami Zacherle, who informed him that
her husband, Defendant, was the last person to drive the vehicle. She

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1 also advised Deputy Hawley that Defendant "had an incident" with his
2 young niece who lived within half a mile of the vehicle's location.

3 Deputy Hawley proceeded to the niece's residence. Ms. Reed, the
4 niece's mother, informed Deputy Hawley that her 14-year-old daughter,
5 B.R., had awoken to discover a man lying on her bedroom floor. The
6 man fled the scene when someone knocked on B.R.'s bedroom door. Ms.
7 Reed directed Deputy Hawley to an address on Highway 97 owned by
8 Shirley Zacherle, Defendant's mother. Ms. Reed indicated that
9 Defendant was staying there. Upon arriving at the Highway 97
10 residence, Deputy Hawley made contact with Defendant and arrested him
11 for first degree criminal trespass. Deputy Hawley observed
12 Defendant's car, which he had seen earlier parked near B.R.'s home.
13 Inside the car, Deputy Hawley observed a computer tower and an
14 electrical shocking device.

15 On February 6, 2006, the Federal Bureau of Investigation was
16 contacted by Rachel Graves. Ms. Graves recounted that Tami Zacherle,
17 Defendant's wife, had shown her a video tape and a number of 3.5 inch
18 computer disks that contained images of naked children. According to
19 Tami, Ms. Graves said, the images belonged to Defendant and Defendant
20 had recorded the video, which depicted his niece, B.R. Tami also told
21 Ms. Graves that Defendant could be heard masturbating in the
22 background of the video.

23 On February 13, 2006, Tami reported Defendant as a missing
24 person. She advised the FBI that she had found images of child
25 pornography at the residence she shared with Defendant and in his car
26 from September 2004 to June of 2005. She also provided the FBI with

1 two hard drives and over 100 computer disks containing images of child
2 pornography. She further told the FBI that her husband had a hard
3 drive with him containing additional images.

4 On February 14, 2006, a detective with the Okanogan County
5 Sheriff's office photographed a vehicle that resembled the vehicle of
6 Defendant parked outside the residence on Highway 97. The same day, a
7 Colville Tribal Police Detective observed the same car in the
8 driveway. There was no computer in the car at that time. The tribal
9 officer eventually made contact with Defendant's brother, who would
10 neither admit nor deny that Defendant had been staying at the house on
11 Highway 97.

12 The FBI again spoke with Tami on February 15, 2006. She
13 indicated that her husband stayed with his mother whenever they had
14 marital difficulties. She further indicated that his mother resided
15 on Highway 97.

16 On February 17, 2006, Magistrate Judge Imbrogno issued a warrant
17 based on the affidavit of Special Agent Frank Harrill. The warrant
18 authorized the FBI to search the Highway 97 residence for evidence of
19 possession of child pornography. The warrant incorporated by
20 reference Attachment A, a description of the Highway 97 residence, and
21 Attachment B, a description of the items to be seized.

22 **B. The Search**

23 On February 17, 2006, FBI Special Agent Wesley Floyd, accompanied
24 by several tribal officers, executed the search warrant at the Highway
25 97 residence. The officers made contact with Defendant and his
26 father, Larry Zacherle. The officers advised that the purpose of the

1 search was to find a "computer tower CPU" that had been brought from
2 Defendant's residence in Nespelem. Defendant identified this computer
3 as a Dell desktop, 2100 CPU, located on a table in the front room of
4 the residence. The officers seized the Dell.

5 The officers also observed an HP computer next to the Dell that
6 appeared to be connected to the Internet. With Defendant's consent,
7 the officers ran the PreSearch program on the HP, but the program did
8 not find any images of child pornography.

9 Defendant was arrested and taken to jail. He asked Agent Floyd
10 to return certain personal items to the Highway 97 residence. Agent
11 Floyd returned the items to the Highway 97 residence and made contact
12 with Larry Zacherle. Agent Floyd then seized the HP, allegedly with
13 Larry Zacherle's consent.

14 Defendant was subsequently charged with Possession and Receipt of
15 Child Pornography in violation of 18 U.S.C. § 2252A(5)(B),(2)(A).

16 **DISCUSSION**

17 **I. Motion to Suppress (Ct. Rec. 176; 38)**

18 Defendant moved the Court for an order suppressing all evidence
19 seized from the residence located on Highway 97 in Okanagan,
20 Washington on February 17, 2006. (Ct. Rec. 176; Ct. Rec. 38). The
21 Court addressed Defendant's motion to suppress by separate order.

22 **II. Motion to Consolidate Counts (Ct. Rec. 178)**

23 Defendant asserts that the four main counts in the Superseding
24 Indictment are essentially for Defendant's alleged receipt and
25 possession of child pornography during the period from May 14, 2002,
26 through November 8, 2007. (Ct. Rec. 178 at 4). Defendant argues that

1 only one count of possession and one count of receipt is appropriate,
2 and, because possession is a lesser included offense of receipt, the
3 government must dismiss one or the other of these counts. *Id.*
4 Defendant contends, as a result, that he should proceed to trial on
5 just one count, not four, for his alleged conduct. *Id.*

6 The government argues that the Superseding Indictment properly
7 charges Defendant for his conduct and is not multiplicitous. (Ct.
8 Rec. 203 at 2-5). The government explains that Count 1 is based on
9 child pornography found on computer disks and Defendant's computer,
10 Count 2 is based on child pornography found on approximately 58
11 computer disks belonging to Defendant, and Counts 3 and 4 relate to
12 175 computer disks found by a farmer in a field near Defendant's
13 residence. (Ct. Rec. 203 at 3). The government argues that the
14 receipt counts have different dates than the possession counts, and
15 the possession and receipt charges are based on evidence found in
16 separate locations and discovered at different times. (Ct. Rec. 203
17 at 4).

18 In addition to a forfeiture of items count (Count 5), the
19 Superseding Indictment alleges the following:

- 20 1. On or about February 16, 2003, through on or about March 5,
21 2005, Defendant knowingly received child pornography.
- 22 2. On or about March 6, 2005, through on or about February 13,
23 2006, Defendant knowingly possessed child pornography.
- 24 3. On or about May 14, 2002, through on or about October 22,
25 2005, Defendant knowingly received child pornography.
- 26 4. On or about October 23, 2005, through on or about November
8, 2007, Defendant knowingly possessed child pornography.

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1 (Ct. Rec. 124). There is certainly overlap with respect to the
2 allegations in the Superseding Indictment of receipt (on or about
3 February 16, 2003, through on or about March 5, 2005, and on or about
4 May 14, 2002, through on or about October 22, 2005) and of possession
5 (on or about March 6, 2005, through on or about February 13, 2006, and
6 on or about October 23, 2005, through on or about November 8, 2007).
7 It appears the Superseding Indictment essentially alleges that
8 Defendant both received and possessed child pornography from the
9 period of May 14, 2002,¹ to November 8, 2007.

10 When a defendant has violated two different criminal statutes,
11 the double jeopardy prohibition is implicated when both statutes
12 prohibit the same offense or when one offense is a lesser included
13 offense of the other. *Rutledge v. United States*, 517 U.S. 292, 297,
14 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) (Court employed the *Blockburger*
15 test to determine whether one offense is a lesser included offense of
16 another). If two different criminal statutory provisions indeed
17 punish the same offense or one is a lesser included offense of the
18 other, then conviction under both is presumed to violate congressional
19 intent. *Missouri v. Hunter*, 459 U.S. 359, 366-67, 103 S.Ct. 673, 74
20 L.Ed.2d 535 (1983).

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23 ¹Although the Superseding Indictment alleges that Defendant
24 possessed child pornography at the earliest March 6, 2005, the
25 Superseding Indictment alleges that Defendant received child
26 pornography as early as May 14, 2002. (Ct. Rec. 124). It is
impossible to receive child pornography without, at least at the
very instant of receipt, also possessing it. See, *U.S. v.*
Davenport, 519 F.3d 940, 943 (9th Cir. 2008).

1 The Ninth Circuit has determined that, under the *Blockburger*
2 test, the offense of possessing child pornography is a lesser included
3 offense of the receipt of child pornography. *U.S. v. Davenport*, 519
4 F.3d 940, 947 (9th Cir. 2008). Accordingly, "while the government may
5 have been within constitutional boundaries to include both offenses in
6 the indictment" entering judgment against Defendant on both counts
7 would be multiplicitous and in violation of the Fifth Amendment's
8 prohibition of double jeopardy. *Davenport*, 519 F.3d at 944.

9 Because the offense of possessing child pornography is a lesser
10 included offense of the receipt of child pornography, the government
11 may not punish Defendant for both offenses. Nevertheless, the
12 government may include both offenses in the indictment and may
13 continue to prosecute Defendant for both offenses through trial.
14 *Davenport*, 519 F.3d at 944; *See, Ball v. United States*, 470 U.S. 856,
15 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). It is the punishment, not
16 the prosecution, that would violate Defendant's Fifth Amendment right
17 to be free from being punished twice for a single criminal offense.

18 While the Court herein denies Defendant's motion to consolidate
19 counts (Ct. Rec. 178), the government should be mindful that there may
20 be double jeopardy implications by continuing to proceed in the
21 current fashion.

22 **III. Motion to Dismiss (Ct. Rec. 180; 82)**

23 Defendant requests an order dismissing the Superseding Indictment
24 due to "Triple Jeopardy." (Ct. Rec. 180; 82). Defendant argues that
25 the instant accusations arise out of the identical allegations of

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1 facts for which he has already faced charges in Tribal Court and then
2 State Court. (Ct. Rec. 82 at 1).

3 The Fifth Amendment of the United States Constitution provides,
4 in part, that no person shall be "subject for the same offence to be
5 twice put in jeopardy of life or limb." U.S. Const. amend. V. The
6 amendment protects a criminal defendant against multiple punishments
7 or subsequent prosecutions for the same offense. *Schiro v. Farley*,
8 510 U.S. 222, 229-230 (1994). "The applicable rule is that, where the
9 same act or transaction constitutes a violation of two distinct
10 statutory provisions, the test to be applied to determine whether
11 there are two offenses or only one, is whether each provision requires
12 a proof of a fact which the other does not." *Blockburger v. United*
13 *States*, 284 U.S. 299, 304 (1932) (holding that two offenses were
14 committed despite a single act resulting in the violation of two
15 sections of a statute). As such, the Double Jeopardy clause as
16 interpreted by *Blockburger* allows the prosecution of an offense
17 arising out of the same transaction which requires at least one proof
18 of fact, or element, that is different from those elements required by
19 another charged offense. *Id.*

20 On May 17, 2006, Defendant was found guilty in Tribal Court of
21 Sexual Exploitation of a Minor Child. (Ct. Rec. 82, Exh. 12-16). The
22 elements of a charge of Sexual Exploitation of a Minor Child are: 1)
23 compelling a minor by threat or force to engage in sexually explicit
24 conduct; OR aiding, inviting, employing, or otherwise causing a minor
25 to engage in sexually explicit conduct; OR being a person with custody
26 or control over a minor and aiding, inviting, employing, or otherwise

1 causing a minor to engage in sexually explicit conduct, 2) for the
2 purpose of his/her or another's sexual gratification, monetary or
3 other benefit.

4 On May 18, 2006, Defendant was charged by Information in Okanogan
5 County Superior Court with Voyeurism, in violation of RCW
6 9A.44.115(2)(a), and Residential Burglary, in violation of RCW
7 9A.52.025(1). (Ct. Rec. 82, Exh. 20-23). In Washington, the elements
8 of a charge of Voyeurism are: 1) knowingly viewing, photographing or
9 filming a second person, 2) without his/her knowledge and consent, 3)
10 for the purpose of arousing and gratifying the sexual desire of any
11 person, 4) while the second person was in a place where he/she had a
12 reasonable expectation of privacy OR that the intimate areas of the
13 second person were areas that are covered by clothing and intended to
14 be protected from public view. RCW 9A.44.115. In Washington, the
15 elements of a charge of Residential Burglary are: 1) entering or
16 remaining unlawfully in a dwelling of another, 2) with intent to
17 commit a crime against a person or property therein, 3) in the State
18 of Washington. RCW 9A.52.025(1). On February 8, 2007, a jury found
19 Defendant not guilty of both counts. (Ct. Rec. 82, Exh. 24).

20 Here, Defendant has been charged with Possession of Child
21 Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), and Receiving
22 Child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A). The
23 elements of a charge of Possession of Child Pornography are: 1)
24 knowingly possessing material which Defendant knew contained visual
25 depiction(s) of a minor engaged in sexually explicit conduct, 2) that
26 Defendant knew each visual depiction contained in the material was of

1 a minor engaged in sexually explicit conduct, 3) that the material
2 containing the visual depictions were produced using such materials
3 that had been transported in interstate or foreign commerce. 18
4 U.S.C. § 2252A(a)(5)(B). The elements of Receiving Child pornography
5 are: 1) knowingly receiving an item containing material which
6 Defendant knew contained visual depiction(s) of a minor engaged in
7 sexually explicit conduct, 2) that Defendant knew each visual
8 depiction was of a minor engaging in sexually explicit conduct, and 3)
9 that the material containing the visual depictions were produced using
10 such materials that had been transported in interstate or foreign
11 commerce. 18 U.S.C. § 2252A(a)(2)(A).

12 As discussed above, the Double Jeopardy clause as interpreted by
13 *Blockburger* allows the prosecution of an offense arising out of the
14 same transaction if at least one proof of fact, or element, is
15 different from the elements of another charged offense. *Blockburger*,
16 284 U.S. at 304. A comparison of the charges brought by the Tribal,
17 State, and Federal Courts shows that the federal charges do not
18 constitute double or "triple" jeopardy under the *Blockburger* test
19 because the federal offenses contain several facts of proof which are
20 either different or missing in the tribal and state charges. See,
21 *supra*. Defendant's motion to dismiss (Ct. Rec. 180; 82) is therefore
22 denied.

23 **IV. Motion in Limine (Ct. Rec. 182; 97)**

24 Defendant's motion in limine (Ct. Rec. 182; 97) requests that the
25 Court limit testimony, evidence and other matters at Defendant's
26 trial. Defendant's motion essentially requests that the government be

1 restrained from violating the federal rules of evidence, the federal
2 rules of criminal procedure and case law interpreting those rules.
3 Defendant specifically requests that the government be precluded from
4 presenting the following twenty-five items of evidence:

- 5 1. Uncharged alleged offenses or allegations of domestic
6 violence;
- 7 2. Items seized by search warrants not relevant to the charges
8 in the Superseding Indictment;
- 9 3. Opinion evidence without foundation;
- 10 4. Defendant's criminal convictions;
- 11 5. Non-disclosed evidence which the government intends to use
12 to show motive, intent, plan or scheme pursuant to Fed. R.
13 Evid. 404(b) or which the government failed to disclose in
14 response to the Court's Discovery Order and Defendant's
15 discovery requests;
- 16 6. Plea bargaining endeavors or negotiations;
- 17 7. Any pre-trial motions;
- 18 8. Any reference to usage of drugs by Defendant;
- 19 9. Characterization of Defendant as dangerous, sinister and
20 undesirable and therefore more likely to have committed the
21 crimes charged;
- 22 10. False, misleading or inadmissible evidence;
- 23 11. Perjured testimony;
- 24 12. Questioning a witness to characterize the testimony of a
25 defense witness as "lies";
- 26 13. Attack or belittling of defense counsel;
14. Stressing the prestige of the prosecutorial office;
15. Suggestion that cooperation agreement with witnesses allow
the prosecutor to know what the truth is;
16. Reference to matters outside the record or insinuation that
issues of fact have already been decided;

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- 1 17. Lessening the jurors' sense of responsibility by making
2 inappropriate comments;
- 3 18. Impermissible remarks including reference to the possibility
4 of mitigation of punishment;
- 5 19. Re-created documents that do not comport with originals;
- 6 20. Secondary evidence;
- 7 21. Any evidence in violation of Fed. R. Evid. 1004, 1003, 1002,
8 1001, 901, 403 and/or 404(b);
- 9 22. Any speculative testimony;
- 10 23. Any testimony in violation of *Crawford v. Washington*, 124
11 S.Ct. 1374;
- 12 24. Letters to police or any other official that may accuse
13 someone of wrongdoing; and
- 14 25. Any reports made for the purpose of producing evidence for
15 litigation.

16 (Ct. Rec. 97).

17 The Court would expect the government to proceed in a manner
18 consistent with the federal rules. In fact, the government has
19 responded that it "intends to conduct the trial in a professional
20 manner, following the Fed. Rules of Evidence." (Ct. Rec. 203 at 7).
21 Defendant's Motion in Limine (Ct. Rec. 182; 97) is granted to the
22 extent provided by the Federal Rules of Evidence, the Federal Rules of
23 Criminal Procedure and case law interpreting those rules.

24 **V. Motion to Instruct Jury (Ct. Rec. 184; 94)**

25 Defendant contends that the tribal trial procedures leading to
26 his conviction varied constitutionally from federal courts. (Ct. Rec.
94). Defendant therefore moves the Court for authorization for
witness testimony at trial or a jury instruction in order to explain
to the jury tribal court variances from federal court procedures.

1 (Ct. Rec. 184; 94). Defendant requests that an attorney knowledgeable
2 in tribal law testify as to constitutional deficiencies in the tribal
3 court proceedings or that a jury instruction indicating the same be
4 presented to the jury. (Ct. Rec. 94 at 4).

5 Defendant has not alleged or demonstrated how his proceedings in
6 the tribal court were specifically unconstitutional or out of
7 compliance with the rules of evidence. Without more, the Court does
8 not believe that an explanatory jury instruction and/or testimony at
9 trial on the subject is necessary. In any event, the government
10 indicates that it "does not intend to present evidence of Defendant's
11 prior 2006 tribal conviction for indecent liberties thus, such
12 testimony or jury instruction is not necessary." (Ct. Rec. 203 at
13 23). Accordingly, Defendant's motion to instruct jury regarding
14 tribal court conviction (Ct. Rec. 184; 94) is denied.

15 **VI. Motion for Jury View (Ct. Rec. 186; 98)**

16 Defendant requests that the jury be permitted to view Defendant's
17 leg and knee scars resulting from old surgeries. (Ct. Rec. 186; 98).

18 It is alleged that the faceless videographer in the videotape of
19 B.R. is Defendant. Apparently, the videographer's legs are displayed
20 on the video, and the legs displayed on the video do not have scars.
21 Defendant contends that he has scars on his legs and that testimony
22 will prove the scars are old. Defendant, therefore, requests that the
23 jury be permitted to view his leg scars to demonstrate that he is not
24 the videographer depicted in the video. Defendant requests he be
25 allowed to wear shorts to one day of trial and display his legs and
26 scars to the jury. He asserts that this would not affect trial

1 orderliness, would not be time consuming and would not confuse or
2 mislead the jury. (Ct. Rec. 98).

3 The government responds that a jury view is not necessary because
4 the 2004 videotape is irrelevant to the pending federal charges and
5 the government does not intend to present any evidence of the
6 videotape. (Ct. Rec. 203). Since the government indicates it does
7 not plan to introduce the videotape, Defendant's leg and knee scars
8 are irrelevant and a jury view of Defendant's legs is unnecessary.
9 Defendant's motion for the jury to view Defendant's leg and knee scars
10 (Ct. Rec. 186; 98) is thus denied, without prejudice.

11 **VII. Motion for Discovery (Ct. Rec. 188)**

12 Defendant requests supplemental discovery. (Ct. Rec. 188).
13 Specifically, Defendant requests (1) the production of a list of the
14 government's anticipated witnesses and contact data and timely access
15 for defense interviews of those witnesses; and (2) the particularized
16 bases and reasons for the handwriting expert's report furnished by the
17 government on January 8, 2008, or any other such report prepared in
18 anticipation of trial. (Ct. Rec. 188).

19 The government indicates it will voluntarily disclose its witness
20 list simultaneously with Defendant's witness list seven days before
21 trial. (Ct. Rec. 203 at 23). The Court finds that the government
22 shall disclose a list of witnesses whom the government expects to call
23 in its case in chief **ten (10) days** prior to trial. The Court
24 indicates, however, that it may not compel government witnesses to be
25 interviewed by defense counsel.

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1 With respect to Defendant's request for the report of the
2 government's handwriting expert, the government indicates it has
3 already provided all copies of Mr. Belcastro's reports in discovery.
4 (Ct. Rec. 203 at 23). The government additionally supplemented the
5 record with materials regarding the government's handwriting expert on
6 November 13, 2008. (Ct. Rec. 213). The Court finds that the
7 government has provided the requested reports and complied with Fed.
8 R. Crim. P. 16(a)(1). Defendant's request for the reports of the
9 government's handwriting expert is thus denied as moot. Accordingly,
10 Defendant's motion for supplemental discovery (Ct. Rec. 188) is
11 granted in part and denied in part.

12 **VIII. Motion to Admit Transcripts (Ct. Rec. 190; 96)**

13 Defendant requests that certain portions of prior tribal and
14 state trial transcripts be deemed admissible in the trial in this
15 case. (Ct. Rec. 190; 96). Defendant asserts that each prior
16 proceeding arose out of common overlapping allegations which are the
17 subject of law enforcement reports underlying the instant federal
18 prosecution and the facts presented in the Superseding Indictment.
19 (Ct. Rec. 96). Defendant asserts he anticipates that witnesses common
20 to the prior two proceedings will participate in the trial in this
21 case. The government responds that transcripts from these prior
22 hearings are irrelevant to the charges contained in the Superseding
23 Indictment. (Ct. Rec. 203 at 22).

24 The Court finds that no basis exists for the admission of the
25 tribal and state trial transcripts at the trial in this case.
26 Nevertheless, the parties may use said transcripts for impeachment

1 purposes to the extent they are relevant and otherwise comport with
2 the federal rules. Defendant's motion to admit verbatim transcripts
3 of prior trials (Ct. Rec. 190; 96) is denied in part.

4 **IX. Motion in Limine (Ct. Rec. 192)**

5 Defendant requests that the government be prohibited from
6 alluding to or mentioning (1) Defendant's alleged possession and
7 authorship of the videotape of B.R.; (2) Defendant's possession of a
8 handheld electrical shocking device; and (3) any aspect of Defendant's
9 criminal record, specifically the fact that he was found not guilty by
10 reason of insanity of attempted murder and related charges over 20
11 years ago. (Ct. Rec. 192).

12 Defendant contends that he is on trial for allegedly receiving
13 and possessing child pornography obtained by and through a computer
14 and stored on various storage media, not for either possessing or
15 making the videotape or possessing a handheld electrical shocking
16 device. (Ct. Rec. 192 at 3).

17 **A. Videotape of B.R.**

18 Defendant argues that the videotape is not only irrelevant but is
19 totally unreliable. He asserts that Tami Zacherle fully recanted her
20 testimony in writing that it was Defendant who made the videotape and
21 appeared therein. In any event, proof of making or appearing in the
22 video is not relevant to a determination of whether Defendant received
23 or possessed the materials of which he is accused in this action.
24 Defendant requests that no mention of these matters be made at trial.

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1 The government responds that it does not intend to present
2 evidence in its case in chief of a videotape in Defendant's possession
3 of a minor girl sleeping. (Ct. Rec. 203 at 7). However, the
4 government asserts Defendant's possession of any videos containing
5 sexually explicit images of minors is admissible and relevant. The
6 government also asserts that the videotape may be admissible for
7 impeachment purposes if Defendant testifies in a manner inconsistent
8 with prior statements regarding the videotape. (Ct. Rec. 203 at 7).

9 **B. Shocking Device**

10 Defendant argues that disclosure of his alleged possession of an
11 electrical handheld shocking device is inappropriate, because there is
12 nothing illegal about ownership of such a device and there is no nexus
13 between the device and any allegation in the current criminal action.
14 Defendant contends its mention or introduction at trial would result
15 in prejudice because it would suggest he is engaged in nefarious
16 conduct and therefore apt to receive and possess child pornography.

17 The government responds that it does not intend to present
18 evidence of Defendant's possession of a handheld electrical shocking
19 device on January 28, 2006, unless this device is pictured in any of
20 the child pornography images Defendant possessed or is otherwise
21 admissible for impeachment purposes. (Ct. Rec. 203 at 7-8).

22 **C. Criminal Record**

23 Defendant asserts that any mention of his prior criminal record
24 or the fact of his being found not guilty by reasons of insanity would
25 be prejudicial and would violate Fed. R. Evid. 404(b). Defendant
26 argues its mention would merely suggest that he is a flawed person

1 likely to have engaged in the illegal conduct alleged because he has a
2 history of crime and mental deficiency. (Ct. Rec. 192 at 4-5).

3 The government responds that it does not intend to present such
4 evidence in its case in chief; however, the government wishes to
5 reserve the right to seek to admit such evidence for impeachment
6 purposes. (Ct. Rec. 203 at 8). The government specifically
7 indicated, however, that it does not intend to present any Fed. R.
8 Evid. 404(b) evidence at this time. (Ct. Rec. 203 at 24).

9 Based on the foregoing, Defendant's motion in limine (Ct. Rec.
10 192) is denied without prejudice.

11 **X. Motion in Limine (Ct. Rec. 195)**

12 Defendant also filed a motion in limine with respect to the
13 government's handwriting expert, Peter J. Belcastro, Jr. (Ct. Rec.
14 195). Defendant argues that there is nothing definitive in Mr.
15 Belcastro's education or training that qualifies him as an expert in
16 handwriting comparison or analysis. (Ct. Rec. 211). Defendant
17 contends that, under *Daubert* and Fed. R. Evid. 702, the introduction
18 of any and all evidence concerning forensic testing, comparison and
19 identification of handwritten documents or writings in this case
20 should therefore be prohibited. Defendant has requested a hearing on
21 this motion.

22 "Federal Rule of Evidence 702 allows admission of 'scientific,
23 technical, or other specialized knowledge' by a qualified expert if it
24 will 'assist the trier of fact to understand the evidence or to
25 determine a fact in issue.'" *Elsayed Mukhtar v. California State*
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1 *University, Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002).² Through
2 its decisions in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579,
3 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993), *General Elec. Co.*
4 *v. Joiner*, 522 U.S. 136, 142, 118 S.Ct. 512, 517, 139 L.Ed.2d 508
5 (1997), and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147, 119
6 S.Ct. 1167, 1174, 143 L.Ed.2d 238 (1999), the Supreme Court has
7 emphasized that Rule 702 imposes upon district judges a duty to screen
8 expert testimony to prevent unreliable evidence from reaching the
9 jury. This duty, says the Supreme Court, is like that of a
10 "gatekeeper." See, e.g., *Joiner*, 522 U.S. at 142, 118 S.Ct. at 517.
11 As the gatekeeper, a district judge must make a number of preliminary
12 determinations regarding the admissibility of proposed expert
13 testimony. See, *United States v. Hankey*, 203 F.3d 1160, 1168 (9th
14 Cir.), cert. denied, 530 U.S. 1268, 120 S.Ct. 2733, 147 L.Ed.2d 995
15 (2000). These include:

16 Whether the opinion is based on scientific, technical, or other
17 specialized knowledge;

18 Whether the expert's opinion would assist the trier of fact in
19 understanding the evidence or determining a fact in issue;

20 ///

21 ²As amended in 2000, Rule 702 states:

22 If scientific, technical, or other specialized knowledge
23 will assist the trier of fact to understand the evidence or
24 to determine a fact in issue, a witness qualified as an
25 expert by knowledge, skill, experience, training, or
26 education, may testify thereto in the form of an opinion or
otherwise, if (1) the testimony is based upon sufficient
facts or data, (2) the testimony is the product of reliable
principles and methods, and (3) the witness has applied the
principles and methods reliably to the facts of the case.

1 Whether the expert has appropriate qualifications; i.e., some
2 special knowledge, skill, experience, training or education on
that subject matter;

3 Whether the testimony is relevant and reliable;

4 Whether the methodology or technique the expert uses "fits" the
5 conclusions (the expert's credibility is for the jury to decide);

6 Whether its probative value is substantially outweighed by the
7 risk of unfair prejudice, confusion of issues, or undue
consumption of time.

8 *Id.* (citations omitted).

9 The Court having reviewed the motion, supporting information and
10 response by the government, finds that a hearing is necessary for
11 purposes of making a determination regarding the admissibility of the
12 government's handwriting expert. Unless the parties can agree to a
13 video conference hearing sooner, a *Daubert* hearing with respect to the
14 government's proposed handwriting expert, Peter J. Belcastro, Jr.,
15 shall be held on the first scheduled day of trial.

16 **XI. Motion in Limine (Ct. Rec. 198)**

17 Defendant filed an additional motion in limine requesting that
18 the government be precluded from displaying or showing to the jury any
19 of the child pornography images which may exist. (Ct. Rec. 198).

20 Defendant asserts that he anticipates stipulating or admitting
21 that the various items of computer media contain images that are child
22 pornography. (Ct. Rec. 198). In the event of such a stipulation,
23 Defendant claims an issue of fact regarding the existence of child
24 pornography no longer exists. The issue of whether child pornography
25 exists would no longer be in dispute; therefore, there would be no
26 need for the presentation of such evidence. Defendant further asserts
that the only reason to present the images, assuming an admission that

1 they are in fact child pornography, would be to inflame the jury and
2 appeal to the jury's passion and prejudice for the despicable nature
3 of this illegal activity. Defendant contends that any probative value
4 of the images would be outweighed by the prejudice to Defendant. Fed.
5 R. Evid. 403.

6 The government responds that, even if Defendant stipulates to the
7 images of child pornography, the government is still entitled to
8 present evidence of the charges, possession and receipt of child
9 pornography, to the jury in order to prove its case. (Ct. Rec. 203 at
10 14-21). The government indicates that there can be no doubt that
11 jurors would be affected by viewing images of child pornography;
12 however, the Court's voir dire to prospective jurors regarding the
13 nature of the images could be structured to eliminate those jurors who
14 would not be able to view such images without resultant prejudice to
15 Defendant.

16 In *United States v. Sewell*, the Eighth Circuit found that the
17 district court abused its discretion in accepting a defendant's offer
18 to stipulate and forbidding the government from publishing a
19 representative sample of images of child pornography to the jury.
20 *United States v. Sewell*, 457 F.3d 841 (8th Cir. 2006). The Northern
21 District of Iowa also held that "[n]othing in the United States Code
22 as amended by the Adam Walsh Act requires the government to accept a
23 defendant's offer to stipulate that certain images are child
24 pornography or states that the government may not prove its case by
25 evidence of its own choice." *United States v. Johnson*, 456 F.Supp.2d
26 1016 (N.D. Iowa 2006). The Tenth Circuit further held the district

1 court did not abuse its discretion by allowing a jury to view two
2 pornographic images described in the indictment, despite a defendant's
3 offer to stipulate that the images constituted child pornography.
4 *United States v. Campos*, 221 F.3d 1143 (10th Cir. 2000).

5 Showing select images of child pornography will allow the jury to
6 determine if the government met its burden of proof as to whether
7 Defendant knowingly received or possessed an item or items of child
8 pornography and whether at the time of such reception or possession
9 Defendant believed that such item(s) constituted or contained child
10 pornography. The government bears the burden of proving each element
11 of the offense and publishing select images to the jury is the best
12 method, short of Defendant's admission to all elements necessary for
13 his conviction, for the government to prove its case.

14 Even assuming an admission by Defendant that the images are in
15 fact child pornography, the government should not be prevented from
16 showing a representative sample of images of child pornography to the
17 jury to prove the elements of the offenses charged. Appropriate voir
18 dire to prospective jurors' regarding their feelings and beliefs about
19 the nature of such images will reduce or eliminate any prejudice that
20 may result from showing the images to the jury. Accordingly,
21 Defendant's motion in limine to prohibit showing any images of child
22 pornography to the jury (Ct. Rec. 198) is denied.

23 **XII. Government's Motion for Discovery (Ct. Rec. 209)**

24 On November 4, 2008, the government filed a request for Defendant
25 to provide it with a written summary of its expert witness, Marcus
26 Lawson (computer and forensic evidence expert). (Ct. Rec. 209). At

1 the pretrial conference, counsel for Defendant indicated he will
2 comply with the government's request. The government's motion for
3 discovery (Ct. Rec. 209) is granted.

4 The Court being fully advised, **IT IS HEREBY ORDERED:**

5 1. Defendant's motion to consolidate counts (Ct. Rec. 178) is
6 **DENIED.**

7 2. Defendant's motion to dismiss due to "Triple Jeopardy" (Ct.
8 **Rec. 180; 82)** is **DENIED.**

9 3. Defendant's motion in Limine (Ct. Rec. 182; 97) is **GRANTED.**

10 4. Defendant's motion to instruct jury regarding tribal court
11 conviction (Ct. Rec. 184; 94) is **DENIED.**

12 5. Defendant's motion for jury to view Defendant's leg and knee
13 scars (Ct. Rec. 186; 98) is **DENIED, with leave to renew.**

14 6. Defendant's motion for discovery (Ct. Rec. 188) is **GRANTED in**
15 **part and DENIED in part.** The government shall disclose a list of
16 witnesses whom the government expects to call in its case in chief **ten**
17 **(10) days** prior to trial. Defendant's request for the reports of the
18 government's handwriting expert is denied as moot.

19 7. Defendant's motion to admit verbatim transcripts of prior
20 trials (Ct. Rec. 190; 96) is **DENIED in part.** Such transcripts may be
21 used at trial for impeachment purposes.

22 8. Defendant's motion in limine (Ct. Rec. 192) is **DENIED, with**
23 **leave to renew.**

24 9. Defendant's motion in limine to prohibit showing any images
25 of child pornography to the jury (Ct. Rec. 198) is **DENIED.**

26 ///

11. Unless the parties can agree to a video conference hearing sooner, a *Daubert* hearing with respect to the government's proposed handwriting expert, Peter J. Belcastro, Jr., shall be held on the first scheduled day of trial.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 20th day of November, 2008.

S/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge